UNITED STATES
v.
ZACK RASTOPSOFF (DECEASED)
AYAKULIK, INC., INTERVENOR/APPELLANT

IBLA 90-407 Decided November 4, 1992

Appeals from a decision of Administrative Law Judge Ramon M. Child holding that Zack Rastopsoff's Native allotment claim was legislatively approved pursuant to section 905(a)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(1) (1988). AA-7538.

Reversed.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

   Sec. 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1988), provided for legislative approval, subject to valid existing rights, of all Alaska Native allotment applications, with certain caveats, one of which was that the section applied only to applications which described land that was unreserved on Dec. 13, 1968. Where the land described in a Native allotment application was reserved on Dec. 13, 1968, legislative approval does not apply.

2. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Contests and Protests: Government Contests

   Where the Government contests a Native allotment application, the Native is required to make satisfactory proof, by a preponderance of the evidence, of substantially continuous use and occupancy of the claimed land for a minimum of 5 years. Such use and occupancy contemplates substantial actual possession and use of the land, at least potentially exclusive of others.

3. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Contests and Protests: Government Contests

Where the evidence presented at a hearing on a Government contest of a Native allotment application in support of the Native's position that he utilized the claimed lands for fishing and hunting in accordance with the customs of the Natives of the area fails to show substantial actual possession and use of the claimed land, the application is properly rejected.

4. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Contests and Protests: Government Contests

Even if the evidence presented at a hearing on a Government contest of a Native allotment application could be considered as establishing substantial actual possession and use of the available claimed lands, the application will be rejected where the evidence shows that the Native's use of the land was not potentially exclusive of others because he was one of many Natives who utilized the claimed lands for subsistence activities during the period of claimed use and occupancy and there was no evidence that the applicant had recognized authority over the land during that period.

APPEARANCES: Regina L. Sleater, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for appellant, Bureau of Land Management; Charles A. Winegarden, Esq., Kodiak, Alaska, for intervenor/appellant, Ayakulik, Inc.; Michael C. Roebuck, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for Zack Rastopsoff (deceased), appellee.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

The Bureau of Land Management (BLM) and Ayakulik, Inc. (Ayakulik), have filed separate appeals from the May 15, 1990, decision of Administrative Law Judge Ramon M. Child holding that Zack Rastopsoff's Native allotment application (AA-7538) was legislatively approved pursuant to section 905(a)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(1) (1988).

In a Native allotment application dated April 27, 1971, Rastopsoff claimed seasonal use, beginning in July and ending in September, for each year from 1947 until the date of the application of approximately 123 acres of land in two separate parcels (A and B) on Kodiak Island at the mouth of the Ayakulik (a.k.a. Red) River. He made no claim of improvements to the land. Parcel A is located on the north side of the mouth of the Ayakulik

River and parcel B is located on the south side of the river but does not extend to the mouth of the river (Exh. G-2). The Bureau of Indian Affairs certified the application on April 3, 1972, and transferred it to BLM on April 10, 1972. Rastopsoff died on May 20, 1979, at the age of 50 years.

In 1980, Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA). Section 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1988), provided for legislative approval, subject to valid existing rights, of Native allotment applications "which were pending before the Department of the Interior on or before December 18, 1971, and which describe * * * land that was unreserved on December 13, 1968." However, section 905(a)(5) of ANILCA, 43 U.S.C. § 1634(a)(5) (1988), provided that Native allotment applications would not be legislatively approved in accordance with section 905(a)(1) and would be adjudicated pursuant to the requirements of the Alaska Native Allotment Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970), 1/ "if on or before the one hundred and eightieth day following December 2, 1980," the State of Alaska filed a protest under section 905(a)(5)(B) of ANILCA. The State filed a timely protest.

On September 29, 1988, the United States, acting through BLM, brought a contest against Rastopsoff's Native allotment. Judge Child held a hearing in the case on August 8 and 9, 1989, in Anchorage, Alaska. At the commencement of the hearing, the State of Alaska and Alaska Legal Services Corporation (ALSC), counsel for Rastopsoff, submitted a settlement agreement to Judge Child. The State of Alaska withdrew its protest, and it was dismissed as a party (Tr. 9-11). ALSC moved to dismiss the complaint arguing that withdrawal of the protest revived the legislative approval provision of section 905(a)(1), 43 U.S.C. § 1634(a)(1) (1988). Judge Child took that motion under advisement and proceeded with the hearing (Tr. 21-22).

On May 15, 1990, Judge Child issued his decision from which these appeals have been taken. In his decision, Judge Child made the following conclusions of law, all of which are being challenged on appeal:

> 3. At the time Mr. Rastopsoff initiated his Native allotment claim, it was unappropriated, unreserved, vacant, and available for his selection.
>
> 4. The State's withdrawal of its protests removes the bar to Congressional approval.
>
> 5. Mr. Rastopsoff's claim was Congressionally approved pursuant to section 905(a)(1) of ANILCA.

---

1/ Repealed effective Dec. 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1988), with a savings provision for applications pending on Dec. 18, 1971.

6. Mr. Rastopsoff made substantially continuous use and occupancy of the land for a period of 5 years.

7. Mr. Rastopsoff's use and occupancy of the land was at least potentially exclusive of others and not merely intermittent. [2/]

(Decision at 13).

BLM argues that Judge Child erred for two reasons in concluding that the application was legislatively approved: (1) the land applied for was not unreserved on December 13, 1968, and (2) the filing of the State's protest barred legislative approval pursuant to section 905(a)(1) of ANILCA and the State's withdrawal of the protest did not remove that bar, citing Stephen Northway, 96 IBLA 301 (1987). BLM asserts that Rastopsoff did not qualify for the land because he did not substantially use and occupy the land. His use of the land, BLM charges, was limited to seasonal use for hunting and fishing with other members of the community. BLM contends that his use was never potentially exclusive of others and that no one considered the land to be his until after the filing of his application. Finally, BLM argues that even if his use of the land was qualifying, Judge Child found that Rastopsoff ceased to use the land in 1964 and that upon cessation of use, Public Land Order No. (PLO) 1634 (23 FR 3350 (May 9, 1958)), which withdrew the land for the use of the Native village of Ayakulik, attached to the land and prevented his 1971 application from reviving his inchoate right.

Ayakulik agrees with BLM that Rastopsoff's application was not legislatively approved, adopting the arguments provided by BLM. Ayakulik also contends that Rastopsoff's use of the land was not qualifying because his subsistence fishing from 1947 to 1950 did not take place on unappropriated land. Ayakulik charges that the land from which Rastopsoff fished, while part of the land described in his application, was not available because it had been patented in 1896 (Mineral Certificate No. 58). Ayakulik claims that the only evidence of subsistence hunting on the part of Rastopsoff occurred from 1958 through 1961, during a time when the land was withdrawn by PLO 1634. Ayakulik concludes that Rastopsoff never used land that was not unappropriated or unreserved. It further alleges that any use of the land by Rastopsoff was intermittent and not potentially exclusive of others. Ayakulik also agrees with BLM that any right of Rastopsoff to the land that may have arisen ceased prior to 1971.

We turn first to Judge Child's ruling that Rastopsoff's application was legislatively approved pursuant to section 905(a)(1) of ANILCA. That ruling must be overturned.

---

2/ Although realizing that his conclusion regarding legislative approval was dispositive, Judge Child ruled on the issue of use and occupancy "in order to remove the necessity of a remand in the event the Board should see Issue B [legislative approval] differently" (Decision at 9).

Judge Child's ruling was based on his analysis of a line of Board cases beginning with United States v. Napouk, 61 IBLA 316 (1982). In Napouk, the Native allotment applicant filed an appeal of an Administrative Law Judge's decision rejecting his allotment. The Board vacated the decision as to two parcels in the application because the State had withdrawn its section 905(a)(5)(B) protest, stating that absent other action which may have arisen before the end of the 180-day protest period, the allotment was subject to legislative approval. As to the third parcel in the application, the Board found the State's protest to be "legally insufficient" and, thus, not a statutory barrier against legislative approval. In Luke F. Kagak, 84 IBLA 350 (1985), adjudication of the Native allotment was triggered by the filing of a State protest pursuant to section 905(a)(5)(B). The applicant appealed the rejection of his claim and on appeal the State withdrew its protest as part of a stipulation agreed to by all the parties. The Board vacated the decision appealed from and remanded the case with instructions to hold the application for approval under ANILCA. Thereafter, in Stephen Northway, 96 IBLA 301, 306 (1987), the Board overruled Kagak and distinguished Napouk, holding that if a legally sufficient protest is timely filed pursuant to section 905(a)(5)(B), the subsequent withdrawal of the protest will not result in revival of legislative approval.

Judge Child stated that if Northway were the "latest pronouncement by the Board on the issue, we would reluctantly be constrained to follow" (Decision at 9). However, he found that the Board had "impliedly overruled its holding in Northway, revived the vitality of Kagak, and reaffirmed the validity of Napouk" in its decision in State of Alaska, 109 IBLA 339 (1989)." Id. Judge Child came to that conclusion even though none of those three cases was cited in State of Alaska.

Judge Child's reliance on State of Alaska is completely misplaced. That case involved section 905(a)(4) of ANILCA, not section 905(a)(5)(B), and the question presented in the case was whether State selection applications, refiled to take advantage of the provisions of section 905(e) of ANILCA, precluded legislative approval of a Native allotment application. The Board concluded that they did not. In recounting the procedural history of the case, the Board stated that the State of Alaska had filed two ANILCA section 905(a)(5)(B) protests, both of which BLM summarily dismissed as legally insufficient, one on December 17, 1981, and the other on January 18, 1982. The Board then related, without further comment, that the State withdrew its protest on June 30, 1982. Clearly, however, that withdrawal was of no effect since the protests had previously been disposed of by BLM as insufficient. The lack of a citation in State of Alaska to Northway or the other two cases is easily understood. These cases had absolutely no relevance to the disposition of State of Alaska, and Judge Child's reliance on that case as overruling Northway and as support for his conclusion that Rastopsoff's application was legislatively approved is clear error.

Moreover, although ALSC urges that we overturn our Northway decision, there is no reason in this case to be concerned with the question of whether

withdrawal of the State's protest removed the prohibition to legislative approval. As BLM points out, legislative approval is barred in this case on other grounds. In its response to the appeals of BLM and Ayakulik, ALSC does not really dispute that assertion. 3/

[1] Section 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1988), provided for legislative approval, subject to valid existing rights, of "all" Alaska Native allotment applications, with certain caveats, one of which was that the section applied only to applications "which describe either land that was unreserved on December 13, 1968, or land within the National Petroleum Reserve." The land at issue in this case was not "unreserved on December 13, 1968."

Executive Order (EO) 8344, dated February 10, 1940, withdrew all of Kodiak Island from settlement, location, sale, or entry for classification. 4/ EO 8857, dated August 19, 1941, superseded EO 8344 and created the Kodiak National Wildlife Refuge. 5/ It also opened to settlement a 1 mile wide strip of land along a certain part of the shoreline of Kodiak Island. Rastopsoff's claimed land is within that area.

However, PLO 1634, dated May 9, 1958, revoked EO 8857 and reestablished the Kodiak National Wildlife Refuge with expanded boundaries, including the shoreline identified in EO 8857. PLO 1634 excepted from its withdrawal "an area one square mile surrounding each of the native villages of Old Harbor, Akhiok, Larsen Bay, Uganik, Uyak, Alitak, Ayakulik, and Kaguyak" (23 FR 3350 (May 17, 1958)). Those areas were included within the EO 8344 withdrawal. Rastopsoff's claimed land is within the 1 square-mile area surrounding the Native village of Ayakulik.

EO 8344 was revoked by PLO 2417, dated June 26, 1961 (26 FR 5926 (July 1, 1961)). Excepted from the restoration made by PLO 2417, however, were the same areas described in PLO 1634. They continued to be withdrawn until passage of ANILCA, which provided at section 1427(e), 94 Stat. 2525-26, inter alia, for conveyance of the surface estate of the 1 square-mile area of land surrounding the Native village of Ayakulik to Ayakulik, Inc., in settlement of all claims against the United States.

The land in question was not "unreserved" on December 13, 1968. 6/ Therefore, by express statutory exclusion, the lands in question were not

---

3/ "Because it now appears likely that a withdrawal prevented legislative approval, appellee only addresses the appeal of Judge Child's favorable adjudication of his allotment claim under the Allotment Act" (Response at 5-6 n.5).

4/ Title 3, Code of Federal Regulations Compilation 1938-1943 at 618.

5/ Title 3, Code of Federal Regulations Compilation 1938-1943 at 986.

6/ Exhibit G-2 shows that certain lands described in Rastopsoff's application as parcel A overlap land included in Mineral Certificate No. 58. That patent, issued in 1896, predated Rastopsoff's alleged use of the land.

eligible for the legislative approval of section 905(a)(1) of ANILCA. See United States v. Estabrook, 94 IBLA 38, 41-42 (1986).

Since legislative approval does not lie in this case, Rastopsoff's application was required to be adjudicated in accordance with the requirements of the Native Allotment Act and the applicable regulations. In his decision, Judge Child concluded that Rastopsoff had complied with those requirements. We reverse. Judge Child's analysis of the evidence presented at the hearing reveals that he failed to examine that evidence with a critical eye.

[2] Section 1 of the Alaska Native Allotment Act of May 17, 1906, authorized the Secretary of the Interior "in his discretion and under such rules as he may prescribe" to allot up to 160 acres of vacant, unappropriated, and unreserved nonmineral land to a Native Alaskan who is head of a family or 21 years of age. 43 U.S.C. § 270-1 (1970). The principal statutory prerequisite for proving entitlement to an allotment is that the claimant must submit satisfactory proof "of substantially continuous use and occupancy of the land for a period of five years." 43 U.S.C. § 270-3 (1970). As defined by the Department, such use and occupancy "contemplates the customary seasonality of use and occupancy * * * of any land used by [the applicant]" but must be "substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use." 43 CFR 2561.0-5(a).

A Native allotment applicant, no less than any other public land claimant, is required to establish compliance with the applicable laws and regulations and, thus, to bear the burden of establishing entitlement to an allotment. Ira Wassilie (On Reconsideration), 111 IBLA 53, 59 (1989), and cases cited therein. Where the Government contests a Native allotment claim, the Native allotment applicant is required to show entitlement by a preponderance of the evidence. United States v. Estabrook, 94 IBLA at 51-52. The amount of evidence necessary to sustain the burden is a matter of proof on a case-by-case basis. Id.

Three witnesses testified at the hearing in this case: John Bowman, a retired BLM realty specialist who conducted a field examination of the claimed lands in 1978, testified for BLM; intervenor Ayakulik called Andrew Elmer Peterson, Rastopsoff's natural son who was adopted by his maternal grandparents in 1964 at the age of 8; and Walter Simeonoff, Sr., Rastopsoff's brother-in-law, testified for Rastopsoff.

Judge Child discounted the testimony of Bowman and Peterson, finding the former "to be lacking in credibility" and assigning it "little weight,"

---

fn. 6 (continued)
The land embraced by parcel A which overlaps Mineral Certificate No. 58 was not "unreserved" on Dec. 13, 1968.

and giving "little value" to the latter (Decision at 11). 7/ Judge Child relied entirely on the testimony of Simeonoff in reaching his conclusions regarding use and occupancy of the land and potential exclusivity.

Judge Child summarized Simeonoff's testimony as follows:

> Mr. Simeonoff was prominent in the village of Akhiok. (Tr. 132-133) He assisted Mr. Rastopsoff in filing his application for his Native allotment. (Tr. 221-222)
>
> Mr. Simeonoff testified that he saw Mr. Rastopsoff engage in subsistence fishing in the mouth of the Ayakulik River (which bisects Mr. Rastopsoff's claim) in 1947, 1948, 1949, and probably 1950. (Tr. 196-208) He testified further that he heard that Mr. Rastopsoff continued to fish the Ayakulik for some 8 or 9 years. (Tr. 208-209). He also recalled that he hunted with Mr. Rastopsoff in 1958, 1959, 1960, and 1961. (Tr. 210, 220, 231-232) Clearly this is evidence of "customary seasonality of use and occupancy by the applicant of any land use [sic] by him for his livelihood and well-being and that of his family." 43 CFR 2561.0-5(a).
>
> Mr. Simeonoff testified that before Mr. Rastopsoff filed his application he (Simeonoff) did not feel he needed to ask Mr. Rastopsoff's permission to hunt or fish in Ayakulik. After Rastopsoff filed his application in 1971, Mr. Simeonoff and others respected his claim to the land and would ask permission to use it. (Tr. 220-222, 239-240)
>
> * * * * * * *
>
> There is no credible evidence in the record sufficient to overcome Mr. Rastopsoff's potentially exclusive use of his claim.

(Decision at 11-12).

---

7/ Judge Child was apparently influenced in this finding by Bowman's testimony that he approved only about 5 percent of the approximately 200 Native allotment applications for which he conducted field examinations. It is not necessary in the context of this opinion to examine Judge Child's reliance on such a fact to make a "credibility" finding regarding Bowman's testimony in this case.

Judge Child's rationale for finding the testimony of Peterson to be of "little value" apparently was that Peterson was barred from inheriting from Rastopsoff because of his adoption and also that Peterson was born in 1956 and did not begin to accompany his father on fishing trips until 1964. Therefore, arguably he had little or no knowledge of Rastopsoff's activities between 1947 and 1964.

Judge Child's findings of fact are flawed. Simeonoff stated that he first saw Rastopsoff in the area of the mouth of the Ayakulik River in 1947 when Rastopsoff was commercial fishing with his father from their boat the "Judy Kay" (Tr. 195). He stated that a lot of people commercial fished in that area (Tr. 201).

He testified, regarding subsistence fishing by Rastopsoff, that he had direct knowledge of Rastopsoff's activities for the period 1947 through 1950, when Simeonoff was ages 14 through 17 (Tr. 191, 208). He saw Rastopsoff and Rastopsoff's father subsistence fish by beach seining in the mouth of the Ayakulik River in the fall of the year, which he considered to be September and October (Tr. 196, 231). When asked to point out on Exhibit G-2 the location where he saw such fishing taking place, he indicated the end of the spit of land on the south bank of the river at the mouth of the river and the north side of the mouth of the river (Tr. 197-98). Review of Exhibit G-2 shows that the "spit" in question is not part of the lands claimed by Rastopsoff and, in fact, the end of the spit is part of the land patented in Mineral Certificate No. 58. Moreover, the land at the mouth of the river on the north side of the river, although claimed by Rastopsoff, is also part of Mineral Certificate No. 58, and, therefore, it was not available for Native allotment claims. Simeonoff's direct testimony that he saw Rastopsoff subsistence fishing on the beach in these areas cannot support Rastopsoff's allotment claim. It does not show use and occupancy of land available for allotment. In addition, although Simeonoff testified that he heard that Rastopsoff continued to go there to fish for 8 or 9 years after 1950 (Tr. 209), that testimony does not support use and occupancy because it arguably relates to the same lands that were not available for allotment. 8/

Simeonoff did state, however, that Rastopsoff subsistence fished, apparently with reference to Exhibit G-2, "[a]ll the way up" the river (Tr. 235). Such fishing was done by using "a short piece of net, just like beach seining, we use a short piece of net and throw it in the water and scoop the fish up" (Tr. 235). Simeonoff did not indicate whether this fishing was done from a boat or from the river bank. Exhibit G-2 shows approximately 1 mile of the Ayakulik River continuing to the east beyond the boundaries of Rastopsoff's claim. "All the way up" the river would not be on the claimed land.

Simeonoff also testified that others used the same beach seining location at the mouth of the river for subsistence fishing:

> Q. Did you ever see anyone else subsistence fishing on the spot where you showed us?

---

8/ The question which elicited Simeonoff's response regarding fishing after 1950 came from counsel for Rastopsoff who asked: "-- after 1950 do you recall hearing about Zack going to the same spot to fish?" (Tr. 209).

A. Well, there's several people from Karluk that go there, but I can't -- I don't know their names, that subsistence fish there.

(Tr. 202, see Tr. 213). He indicated that people customarily run their subsistence nets right next to one another and that he saw people doing so at the mouth of the Ayakulik River (Tr. 203). Throughout his life, Simeonoff has known of people from Karluk and Akhiok and sport fishermen from Kodiak who fished the Ayakulik River (Tr. 240).

Simeonoff testified that he first went hunting in the claimed area in 1947, but the first time he went there with Rastopsoff was in 1958 (Tr. 210). They went there hunting four times in 4 separate years (Tr. 210, 232). They hunted deer and reindeer and the hunting parties were five or six people (Tr. 204, 219, 232). It was customary to hunt in groups and share the game (Tr. 236). They scattered over the area and would hunt the whole river valley (Tr. 219-20, 224-25, 232-33). Simeonoff also hunted the land with other people when Rastopsoff was not present (Tr. 220). When asked whether they sought Rastopsoff's permission to hunt there, Simeonoff responded: "Well, that was before, before he even selected land over there, we didn't have to ask anybody to hunt" (Tr. 220). Simeonoff indicated that prior to selection by Rastopsoff in 1971, the land in question was considered to be anybody's land (Tr. 239-40).

[3] ALSC argues that the evidence shows that Rastopsoff used the land in the manner contemplated by the Native Allotment Act. ALSC points to the term "customary seasonality of use and occupancy" in 43 CFR 2561.0-5(a) and argues that the evidence of Rastopsoff's use and occupancy must be judged against the customs of the Natives in the area of Kodiak Island in question. We do not disagree with that argument. The question, however, is whether the evidence shows use of the land in question in such a fashion.

ALSC points to the testimony of Peterson that his father "[l]ived off the land mostly," that he hunted and fished and seldom worked (Tr. 156) in support of its position that Rastopsoff pursued a traditional subsistence lifestyle. Again, we do not disagree with the assertion that Rastopsoff followed a traditional subsistence lifestyle, 9/ but the same question arises and that is whether he used the land in question.

As the Board stated in Angeline Galbraith (On Reconsideration), 105 IBLA 333, 338 (1989):

---

9/ Section 803 of ANILCA, 16 U.S.C. § 3113 (1988), defines "subsistence uses" as "the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation * * *." In United States v. Estabrook, supra, the Natives did not pursue a traditional subsistence lifestyle.

> The questions of substantiality and potential exclusivity, while related, actually involve differing considerations. Thus, the applicable regulation expressly notes, in defining the term "substantially continuous use and occupancy," that the use and occupancy contemplated "must be substantial actual possession and use of the land." 43 CFR 2561.0-5(a). Certain uses, by their nature, would necessarily result in "substantial actual possession and use of the land." Thus, it is difficult to ascertain how land containing a house or cabin, or reindeer corrals or vegetable gardens or land used as a headquarters site could not be deemed to manifest the substantiality of use required by the regulations.
>
> Other uses, however, including berrypicking, do not necessarily impart the element of substantiality. In these cases, the critical question is not whether the use occurred at all, but rather the quantum of use. Thus, in the Estabrook case, which involved hunting, we noted that the amount of use alleged therein (two visits per year, varying in duration from a few days to a week per visit) did not constitute substantial actual possession and use of the land but rather was properly characterized as "intermittent." [94 IBLA] at 53-54.
>
> Generally speaking, it can be seen that where a use is "intermittent," it will also not be potentially exclusive of others. But, it is also possible that the claimed use will be lacking in the requisite potential exclusivity even where the use is, itself, substantial. Thus, an individual Native could claim daily use of a trail. While the nature of this use is not one which necessarily gives rise to a finding of substantiality, the frequency of use manifested would certainly provide a sufficient quantum to support a finding of substantially continuous use and occupancy. If, however, the record also established that many Natives used this trail on the same basis as the applicant, the allotment application would be properly rejected. This rejection would not be based on a failure to show substantially continuous use and occupancy but rather on the inability of the applicant to show that the use alleged was, at least potentially, exclusive of others. [Emphasis in original.]

In this case, Rastopsoff claimed no improvements to the land. Galbraith (On Reconsideration) instructs that lack of physical evidence of improvements does not automatically require rejection of an allotment application, but that we must look to the quantum of use. The quantum of use necessary to constitute substantial actual possession and use of the land will vary depending on the customs of the Native involved. Rastopsoff asserted in his application that he utilized the claimed lands for seasonal fishing and hunting. Such use would be qualifying in this case if the evidence showed that Rastopsoff used the land for those purposes for the requisite period of time. It does not.

We find that the evidence presented at the hearing shows that while Rastopsoff engaged in subsistence fishing activities at the mouth of the Ayakulik River in the years 1947-50, the land utilized for such activities was not part of his claimed lands or was land not available because it was previously patented. The testimony that Simeonoff had heard that Rastopsoff continued to fish the Ayakulik River does not support use of the land in question because it does not directly relate to the available lands claimed. Also fishing up river from the claimed lands does not support use of those lands. The only direct evidence of hunting activities by Rastopsoff relates to the whole Ayakulik River valley area and covers a period of only 4 years--1958 through 1961. The commencement of hunting in the summer or fall of 1958 on the claimed lands would not be qualifying because at that time those lands were withdrawn by PLO 1634.

The record fails to establish that Rastopsoff's use of the Ayakulik River area for subsistence fishing and hunting resulted in substantial actual possession and use of the available lands claimed.

[4] Moreover, even if the use shown by the evidence could be considered as substantial actual possession and use of the available claimed lands, Rastopsoff's use of the land was not potentially exclusive of others. There is no evidence that at any time prior to the filing of the allotment application in 1971 anyone considered the claimed lands to be Rastopsoff's. Rather, the claimed lands are some of the lands in the Ayakulik River area that Rastopsoff utilized, along with other Natives, in pursuing a traditional subsistence lifestyle.

The record shows that Parcel A of Rastopsoff's allotment claim contains the old buildings of the Native village of Ayakulik. There is no evidence in the record concerning when that village was last occupied. However, whether or not it was occupied in 1958, its existence, past or present, was recognized by PLO 1634. 10/ The testimony of Simeonoff establishes that many Natives used the lands in question for fishing and hunting. 11/ As we stated in Galbraith (On Reconsideration), 105 IBLA at

---

10/ The field report for parcel A (Exh. G-4), dated May 17, 1979, contains the following notation at page 3:

"Conversation with village personnel of Akhiok revealed that some of the village people didn't approve of the applicant filing on the old village site because of its historic value."

11/ ALSC states that "Zack Rastopsoff used the land with other family members and friends," and "Zack Rastopsoff's use of the land with other family members cannot be used to defeat his allotment claim, since his method of use was the customary way of his people" (Response at 35-36). Contrary to those statements, there is no evidence in the record that Rastopsoff used the land with "family members," other than his father. Rastopsoff's natural son, Alexander Elmer Peterson, testified that "I have a great big family. They all told me that it's true that he [Zack Rastopsoff] never ever go over to Ayakulik for any kind of subsistence, no" (Tr. 172).

339: "If, however, the record also established that many Natives use this trail on the same basis as the applicant, the allotment application would be properly rejected."

ALSC directs our attention to Kootznoowoo, Inc. v. Heirs of Jimmie Johnson, 109 IBLA 128 (1989), in which the Native village corporation for the Native village of Angoon, Kootznoowoo, Inc., filed a private contest against Jimmie Johnson's allotment claim. The corporation alleged that use of the land by other Natives for hunting, fishing, and other subsistence established that Johnson's use was not potentially exclusive. The Board agreed with Administrative Law Judge Harvey C. Sweitzer that "the evidence submitted does not establish that Native community use predated Johnson's use, that it was more extensive than his use, or that it conflicted with his use or wishes." Id. at 135. ALSC asserts that "[t]here is no evidence in the record to show that the use by others was inconsistent, or conflicted, with Zack Rastopsoff's wishes" (Response at 37).

One need only examine Judge Sweitzer's summary of the evidence in Kootznoowoo to conclude that ALSC's reliance on that case does not support its position. Judge Sweitzer stated in his April 17, 1987, decision at pages 17-18:

> Contestant argues that the issue [potential exclusivity] must be resolved in its favor because people other than Jimmie Johnson used the land, and that because Natives used the land, his occupancy was not exclusive. This argument overlooks several key points. First, although others did use the land, their activities were permitted and potentially controlled by Jimmie Johnson. There was ample testimony that he exercised control and authority over the land and that the community recognized his right to exclude others from the land.
>
> Mathew Fred testified that Jimmie was the recognized caretaker of the land (Tr. 44). A caretaker, according to Mr. Fred, had the authority to deny use of the land to others (Tr. 44-45). * * *
>
> Lydia George testified that Jimmie Johnson was considered to own the land (Tr. 188). * * *
>
> David Smith also testified that Jimmie Johnson owned the land * * *.
>
> Following the Tlingit custom, Jimmie Johnson did not require clan members to specifically ask permission to use the land (Tr. 28, 43-44). Permission for a clan member to use the land was given implicitly (Tr. 172, 188-89).
>
> Nevertheless, Jimmie Johnson had recognized authority over the land in parcel B. He not only had the right to use the land,

> but the power to exclude others from the land. Had he chosen to do so, Jimmie Johnson, as tribal chief and caretaker of the land, could have denied access to the land by others. His actions, such as posting his name on the parcel, are indicia that he controlled the allotment area.

Clearly, in Kootznoowoo others were aware of Johnson's claim to the land and their use was with his implicit authorization. Moreover, Johnson had posted his name on the parcel.

ALSC makes much of the fact that in the Ayakulik River area it was not customary to seek permission of each other to fish or hunt on the land. The same was true in Kootznoowoo. Permission was implicit. However, in Kootznoowoo the other Natives knew the land they were using was Johnson's. In this case, there is no record of any actions by Rastopsoff that could be construed as indicia that he controlled the allotment land. There is no evidence that the lands were known as Rastopsoff's fishing grounds or hunting area during the time of utilization of the land such that others might have been aware of his claim to the land. It was only after the completion of the application that anyone knew that Rastopsoff had any claim to the land.

Thus, there is no evidence that Rastopsoff had recognized authority over the land during the period of his claimed use. 12/ His use of the land was not potentially exclusive of others. 13/

Finally, BLM and Ayakulik assert that even if we were to find that the record showed that Rastopsoff had made substantially continuous use and occupancy of the land for a period of 5 years, the heirs of Rastopsoff would not be entitled to receive the "Native Allotment." The reason, they claim, is that Judge Child found, and the record shows, that due to heart

---

12/ ALSC asserts that the record does not reveal any use of the land prior to Zack Rastopsoff's use. Although no specific evidence exists in the record, the fact that Parcel A of the allotment claim embraces the old buildings of the Native village of Ayakulik indicates that there was prior use of the claimed lands.

13/ Our conclusions regarding Rastopsoff's use and occupancy of the land are based on our review of all the evidence in the case. ALSC made no motion to dismiss at the completion of the Government's case. Thus, as we stated in United States v. Estabrook, 94 IBLA at 45, "even though the Government may have failed to establish a prima facie case, any record proof which supports the Government's case may be considered for purposes of decision." In this case, Simeonoff's testimony supports the Government's position that Rastopsoff's use of the land was not substantially continuous use and occupancy, as contemplated by the regulations and Departmental case law.

problems Rastopsoff no longer engaged in subsistence activities in the Ayakulik River area after 1964, and he did not apply for his allotment
until 1971 at which time the lands were withdrawn (Decision at 3; Tr. 164-65, 170, 207). Appellants contend that Rastopsoff's period of nonuse after 1964 and before the filing of his allotment in 1971 allowed the withdrawal to attach to the land, citing United States v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981), and Jonas Ningeok, 109 IBLA 347 (1989).

In Flynn, there was a 9-year period of nonuse prior to the filing of the allotment application, during which time another party filed an application for a trade and manufacturing site. In upholding a decision rejecting the Native allotment application, the Board held that cessation of use or occupancy for a period of time sufficient to remove any evidence of a present use, occupancy, or claim to the land would invalidate an allotment claim. 53 IBLA at 238, 88 I.D. at 389. In Ningeok, the Native allotment application claimed use of certain lands commencing in June 1956, which was many years after a 1943 withdrawal of the land. Thereafter, the Native relinquished his application. In a petition to reinstate his application, he asserted that he was born in 1917, rather than 1922, as officially reported; that he utilized the land with his family for a period of time prior to his father moving the family from the area in 1933; and that upon his return to the area in the mid-1950's he reinstituted use of the land. The Board found that his use of the land with his family prior to 1933 without filing an application did not gain him any rights against the United States, where there was an intervening withdrawal during a period of over 20 years of nonuse. 109 IBLA at 350-51. 14/

In this case, it is not necessary to determine whether there was a cessation of use such that an intervening withdrawal would defeat the allotment claim. The reason is that we have concluded that Rastopsoff did not show substantially continuous use and occupancy of the claimed land for a period of 5 years.

---

14/ ALSC argues that in Kootznoowoo Jimmie Johnson used and occupied the land from 1900 to 1965; that there was a 1909 withdrawal of the land; that Johnson's allotment application was not filed until 1971, 6 years after the cessation of use; but that the Board upheld the Judge's decision regarding the validity of Johnson's allotment. ALSC contends that Kootznoowoo is contrary to Ningeok, which it believes was wrongly decided. First, the evidence in Kootznoowoo was that even though Johnson's personal use ceased 6 years prior to filing the allotment, "his use of the land continued through his children," and "evidence of Jimmie Johnson's claim to the land remained in the form of a sign posted there by him" (Judge Sweitzer's Apr. 17, 1987, Decision at 17). Second, in Ningeok there was nothing in the record to show that any evidence of the Native's use of the land existed during the period of his more than 20-year absence from the land.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Child's decision is reversed and Native allotment application AA-7538 is rejected.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge